IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6160

LAWRENCE MITCHELL,

Petitioner,

v.

W.T. GRANT COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT IN REPLY

I.

THE UNCONSTITUTIONALITY OF THE STATUTES PERMITTING W.T. GRANT COMPANY'S PROCUREMENT OF THE SEIZURE OF LAWRENCE MITCHELL'S REFRIGERATOR, STOVE, WASHER AND PHONOGRAPH WITHOUT PRIOR NOTICE OR OPPORTUNITY FOR A HEARING PRESENTS A JUSTICIABLE CONTROVERSY RIPE FOR DETERMINATION.

Proceeding from a number of premises, W.T. Grant Company (hereinafter, "Grant") asserts in its brief that the issues between the parties were irrevocably resolved below and concludes that the controversy between Petitioner and Respondent has become moot. Respondent's brief, pp. 19-27. Petitioner Lawrence Mitchell (hereinafter, "Mitchell") disputes those premises and the conclusion. Mitchell maintains his position that he has

been deprived of property without prior notice and hearing and seeks review of the decisions below that held such a deprivation to not violate the requirements of due process.

The premises upon which Grant's assertion of mootness depends are that: (1) prior notice and hearing will not benefit Mitchell; (2) there has been a final determination of the ultimate right of possession of the goods seized; and (3) Mitchell somehow abandoned or waived in the proceedings below all of the defenses or counterclaims which he might have otherwise had.

First, it should be made clear that Mitchell is not now asking this court for prior notice and hearing. Mitchell cannot be given prior notice and hearing. He has already been deprived of his property without notice and hearing. Instead, what Mitchell seeks is the release of his household goods because statutes which provide for the seizure of those goods without prior notice and hearing are violative of due process. The responsibility for providing prior notice and hearing for sequestration procedure in the future is lodged in the Louisiana Legislature. It is not certain that the Louisiana Legislature would do so, because, among other reasons, there are many other prejudgment, dispossessory remedies available to Louisiana creditors. *See*, Petitioner's brief, pp. 33-34. Mitchell will in fact benefit from a favorable decision in this Court for he will as a consequence be allowed to enjoy the use of his property while preparing his defense to the merits, unless Grant could meet the stricter criteria of one of the other Louisiana, prejudgment dispossessory remedies.

Grant's second premise, that there has been a final determination of the ultimate right to possession of the goods seized, cannot be supported by either the applic-

able Louisiana law or by the record in this case. Such a premise fails to perceive the relationship between the merits of the case and the sequestration procedure. To obtain a seizure by sequestration, the plaintiff must have filed, or receive permission to file at a later date, a petition containing a claim against the defendant. La. Code Civ. Pro., Arts. 3461, 3462. The seizure by sequestration is a mere adjunct to the claim filed by the plaintiff. The theoretical purpose of the sequestration procedure is to place disputed goods and collateral in the custody of the court pending a determination of the claim, or as stated by Grant:

> The traditional notion of sequestration does not involve taking property from one person and giving it to another, but rather the property is taken into legal custody to conserve it during the pendency of a dispute.... By way of contrast the 'ancient possessory action' of replevin is a method by which a determination of the right to possession may be immediately made ... Respondent's brief, pp. 28-29 (citations omitted).

The record does not support the assertion that there has been a final determination of the ultimate right to possession. Mitchell, when faced with the seizure by sequestration and the claim of the petition, could have defended against either or both. Mitchell chose to attack the seizure first, and the claim of the petition is still pending, subject to discovery, exceptions, answer, reconventional demand, third party demand, trial, and appellate review. La. Code Civ. Pro., Arts. 851-2201. The decisions of the courts below determine that Mitchell will be dispossessed of his property until a determination of the merit of Grant's claim, but do not reach the merits of that claim. *W.T. Grant Company v. Mitchell,* 263 La.

627, 643, 269 So.2d 186, 1192 (1972) (A. 31). A suggestion that the merits of the lawsuit might nevertheless be determined at a hearing on the Motion To Dissolve The Sequestration is contrary to the single Louisiana precedent on that point. *See Tucker and Shonekas v. Al Dohmann Chevrolet, Inc.*, 260 So.2d 99 (La. App.), *writ refused*, 261 La. 1048, 262 So.2d 37 (1972). (Entry of a final judgment on the merits after hearing only the motion to dissolve the sequestration was reversible error requiring remand.) If Grant's assertion that there has been a determination of the ultimate right to possession were correct, the pending trial on the merits would be nothing but an exercise in futility.

Grant asserts as its third premise that this case is moot because Mitchell somehow during the course of the proceedings below abandoned or waived all of the defenses or counterclaims which he might have had. Grant cites a number of cases which support the proposition that *some* defenses are relevant and *may* be raised at the hearing on the motion to dissolve the sequestration. Respondent's brief, pp. 22-25. However, neither those cases nor any other Louisiana authority support the proposition that any defenses not raised at the hearing on the motion to dissolve are waived or abandoned. Mitchell intends to assert his defenses by way of an answer or other appropriate pleading. However, Mitchell first seeks to remove the pressure of the patently unconstitutional seizure from his efforts to prepare his defense.

Finally, Grant construes the stipulation of the parties in the trial court to constitute a waiver or abandonment of all of Mitchell's possible defenses. Respondent's brief, pp. 25-26. The full stipulation was: "It is stipulated that the vendors lien did exist on the items." A. 16. The

stipulation was entered into the record by Grant's trial attorney. A. 16. Mitchell's attorney understood the purpose of the stipulation to be evidentiary. The stipulation was to accommodate Grant by making it unnecessary for an employee of Grant to take the witness stand in order to give the testimony necessary to establish the factual requisites for a vendor's privilege, i.e. there had been a credit sale of goods and a balance remained to be paid on the goods. The law clearly placed the burden upon Grant to prove "the grounds upon which the writ was issued." La. Code Civ. Pro., Art. 3506; *see also*, Petitioner's brief, p. 17, n. 17. The first time that some other construction was placed upon that stipulation was in Grant's brief in this Court.

However, the stipulation of the parties simply does not support Grant's present construction of the stipulation. That stipulation, as vague as it is, says nothing about the amount of money that might be due to Grant from Mitchell, about the propriety of the acceleration of the balance of the payments, or about defenses or counterclaims. To read a determination of those legal and factual issues into that stipulation would ignore the very limited purpose for which Grant's counsel introduced it. That stipulation was introduced to show the statutory grounds on which Grant justified the sequestration. The stipulation is not the most artfully worded even for that purpose, e.g. it is phrased in the past tense without identifying the point in time in the past to which it refers, and it does not identify the holder of the "lien" or items to which the "lien" had once attached. In no event could that stipulation be so broadly construed as urged by Grant as to become a confession of judgment or waiver of defenses by Mitchell. That construction ignores the substance, the purpose, and the fair import of that stipulation.

II.

THE LOUISIANA OFFICIAL ISSUING AN EX PARTE WRIT OF SEQUESTRATION LACKS THE NECESSARY AUTHORITY TO MAKE AN INDEPENDENT INQUIRY INTO THE MERITS OF THE APPLICANT'S UNDERLYING CLAIM.

Grant asserts that the Louisiana sequestration procedure satisfies the requirements of due process, not because the procedure provides prior notice and hearing, but because the official authorizing the ex parte sequestration exercises some discretion in doing so. The assertion is wrong as a matter of both constitutional and Louisiana law. Mitchell has already briefed his constitutional position. As a matter of constitutional law, a statute which provides for a deprivation of property without prior notice and hearing violates due process unless the statute is confined to the "extraordinary situations" clearly and specifically delineated by this Court in prior decisions. The Louisiana statutes providing for sequestration are not narrowly confined to "extraordinary situations." Petitioner's brief, pp. 9-39.

As a matter of Louisiana law, the official authorizing a writ of sequestration lacks the authority to inquire into either the validity of the sequestering party's underlying claim or into the presence of an "extraordinary situation" which might otherwise allow dispensing with prior notice and hearing. The official lacks that authority because neither of those inquiries are considered relevant to the issuance of a writ of sequestration under the Louisiana law. Petitioner's brief, pp. 14-27, 30-45. The function of the judge or clerk who issues a writ of sequestration is a ministerial function. Petitioner's brief, pp. 18-19.

In conjunction with its argument on this point, Grant cites a number of cases construing Louisiana law. Respondent's brief, pp. 37-38, 40. Those cases are apparently cited for the proposition that an official is invested with broad discretion in issuing a writ of sequestration. Those cases lead Grant to the conclusion that the "vendee's interest is more than adequately protected by a disinterested judge who must carefully review the adequacy of the assertions presented in the petition seeking the writ of sequestration," that " 'the allowance or disallowance of sequestration is a matter of judicial discretion,' " and "that it is incumbant upon the issuing judge to weigh the probable merits for the issuance of the writ." Respondent's brief, pp. 37, 40, and 41. However, the cases which are cited by Grant to reach that conclusion do not involve the same type of seizure procedure as was employed in this case and are inapplicable to this case.

For example, on pages 37-39 of Respondent's brief, the Respondent cites two cases dealing with "executory process," a Louisiana foreclosure procedure premised upon a confession of judgment contained in a mortgage in authentic form. The two executory process cases cited by the Respondent were *Ross v. Brown Title Co.*, 356 F. Supp. 595 (E.D. La.), *aff'd.* 421 U.S. 934, 193 S.Ct. 2388 (1973); *Buckner v. Carmack*, ___ La. ___, 272 So.2d 326, *cert. filed*, 42 U.S.L.W. 3006 (April 10, 1973). Executory process is a procedure authorized by a set of statutes and rules completely different and distinct from sequestration. La. Code Civ. Pro., Arts. 2631, *et seq.* What is, or is not, done in an executory proceedings sheds no light on sequestration proceedings. It is like comparing apples and oranges: although they are both fruit, they have totally different flavors and compositions.

Another Louisiana repossessory device with which Respondent confuses the sequestration procedure employed in this case is the similarly named, but distinct procedure of "judicial sequestration," sometimes referred to as "*ex officio* sequestration." Of the cases cited on page 40 of Respondent's brief, *J.C. Trahan Drilling Contractor, Inc. v. Sterling*, 355 F.2d 65 (5th Cir. 1964); *State ex rel. Knighton v. Derryberry*, 188 La. 598, 177 So. 256 (1937); *Bogalusa Ice Co. v. Moffett*, 188 La. 598, 177 So. 679 (1937); *Succession of Pavelka*, 157 La. 480, 102 So. 579 (1924); *Barrow v. Duplantis*, 147 La. 461, 85 So. 205 (1920); and *Dickinson v. Texana Oil Company*, 144 La. 489, 89 So. 669 (1919), all involved "judicial" sequestration.

The sequestration procedure employed in the instant case is provided by Louisiana Code of Civil Procedures, Articles 3501, 3571 and related provisions. On the other hand, the procedure of "judicial sequestration" as discussed in the cases cited by Respondent embodied the unique, broad powers conferred upon judges by Louisiana Code of Civil Procedure, Article 3573.

One of the many distinctions between the two procedures is the very broad discretion allowed a judge to issue or refuse to order a "judicial sequestration." This is in sharp contrast to the "ministerial" nature of the act of authorization of the type of sequestration employed by Grant in the instant case. *See* Petitioner's brief, pp. 16-19. Thus, in the cases cited by Grant on page 40 of its brief for the proposition that allowance or disallowance of "sequestration" is "a matter of judicial discretion" the cases involved not the procedure employed in this case, but "judicial sequestration" a seizure device which issues "by the court on its own motion" and "without requiring security." *See* La. Code Civ. Pro.,

Art. 3573. Thus, in the "judicial sequestration" cases, the appellate courts tend to defer to the trial judge's discretion. In contrast, in the only reported decisions in which a plaintiff sought appellate review of a trial judge's refusal to issue the type of sequestration employed in this case, a writ of mandamus was granted to compel the trial judge to issue the writ of sequestration. *Zion Mercantile Co. v. Pierce*, 163 La. 477, 480, 112 So. 371 (1927); *see also, Mathe v. Mathe*, 177 La. 579, 149 So. 884 (1933) (Mandamus issued to compel sequestration as to some property but not as to other property in dispute). The Louisiana Supreme Court held in the *Pierce* case that it was the trial judge's "mandatory duty" to issue a writ of sequestration when presented with an affidavit and bond in the proper form.

Another distinction between "judicial sequestration" and the type of sequestration procedure employed in this case is that a judge may require notice and hearing prior to a "judicial sequestration." *See e.g., Dickinson v. Texana Oil and Refining Co.*, 144 La. 489, 80 So. 669 (1919) (Show cause hearing held prior to an unbonded, "judicial sequestration.")

The significance of the failure of Grant to distinguish between the sequestration procedure at issue in this case and other Louisiana repossessory procedures is that it leads Grant to the erroneous conclusion "that it is incumbant upon the issuing judge to weigh the probable merits for the issuance of the writ of sequestration." Respondent's brief, p. 41. This suggests that a judicial investigative inquiry into the validity of the plaintiff's claim takes place prior to the issuance of sequestration and that this unique judicial investigation may be substituted for the due process requirement of a prior adversial hearing in which the defendant may participate

after notice. Not only is there a lack of constitutional and Louisiana authority for this assertion, but there is also a complete absence of any hint in the record of the instant case that such a unique judicial investigation took place. The trial judge's order authorizing the sequestration does not hint that a judicial investigation took place; that order allows the writ "as prayed for." A. 5. The trial judge's post-seizure order refusing to dissolve the sequestration does not hint that a judicial investigation took place; that order was premised upon "the pleadings," "the joint stipulation of counsel," and "the oral argument." A. 17. The trial judge did not conduct an independent investigation into the validity of the plaintiff's claim simply because the sequestration procedure contemplates that the validity of the plaintiff's underlying claim is not relevant to the issuance of the writ. The validity of the plaintiff's underlying claim is to be tested by pleadings and the plenary trial on the merits of the lawsuit filed in conjunction with the sequestration. Comment (c) to La. Code Civ. Pro., Art. 3506, states the rule: "This article retains the jurisprudential rule that only the ground for the auxiliary remedy can be inquired into on the motion to dissolve, and not the merits of the main demand."

III.

THE RECORD DOES NOT SUPPORT GRANT'S ARGUMENT THAT SOME TYPE OF NOTICE WAS SERVED UPON LAWRENCE MITCHELL PRIOR TO THE SEIZURE OF MITCHELL'S GOODS.

Grant has raised the argument that the record upon which the Louisiana Supreme Court premised its holding of constitutionality of sequestration is insufficient for this Court to determine that same question. Respondent

states: ". . . there is evidence in the record tending to show that petitioner recieved notice of respondent's proceedings against him on February 7 by means of a substituted service (R. 5).[5]" Respondent's brief, p. 17. Footnote 5 of Respondent's brief then sets out a constable's "return" which does not bear any signature and which was crossed out in the record of this case. R. 5. Not only did Respondent fail to point out that this crossed-out "return," which Respondent characterizes as "evidence," was unsigned, but Respondent also failed to direct this Court's attention to the return which bears a signature, is not crossed-out, and is located immediately adjacent to the unsigned, crossed-out "return." R. 5. The signed return provides:

> Received 3 FEB 1972
> and on FEB 18 1972 19__
> I served a true copy of the within
> CITATION on LAWRENCE
> MITCHELL defendant herein
> in person.
> /s/ Earl Demoulette
> Deputy Constable

The Louisiana rule is that a return is to be deemed prima facie correct once filed and completed with the necessary data and signature. La. Code of Civ. Pro., Art. 1292; *see also, Jefferson v. Jefferson,* 246 La. 1, 13, 163 So.2d 74, 79 (1964) ("The return forms part of the record and must be considered correct for purposes of this review.") It is also the Louisiana rule that the presumption of correctness of a return may be overcome

only by direct attack by motion or petition to nullify. La. Rev. Stat. 13:3471(5).[1]

Grant also attacks the manner in which Mitchell has attempted to call to this Court's attention an error in the dating of the seizure. Mitchell had asserted in the Louisiana courts and in his petition for certiorari to this Court that the seizure had taken place on February 7, 1972. Grant specifically admitted in the Louisiana appellate courts that this was the date on which the seizure took place. The Louisiana Supreme Court found that the seizure took place on February 7, 1972. However, it became evident to both parties during the preparation of the Chronological List of Relevant Docket Entries for the Single Appendix for this Court that the date of seizure was in fact February 18, 1972, and not February 7th. The parties, therefore, listed the date of seizure as February 18, 1972, in the Single Appendix. Mitchell attached as Appendices "B" and "C" to his brief the documents which are required by Louisiana law to record the date of seizure but which had not been placed in the clerk's file by the Constable as required by La.

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[1] La. R.S. 13:3471 *Supplementary rules of service of process.*

* * * * *

(5) The return of the serving officer on any citation or other legal process is conclusive unless directly attacked. Such an attack may be made by rule in the action or proceeding, if made prior to judgment. If made after judgment, the return may be attacked only in a direct action to annul the judgment, which may be brought in the original action or proceeding.

If the defendant was actually served, the court may correct an error in the return by an amendment there of, on a rule brought against and tried contradictorily with the defendant who was served or any other party who may be affected by the amendment.

* * * * *

Code Civil Pro., Art. 3504. The Respondent now argues that the correction muddies the record when tied to the unsigned, crossed out "return." However, the question of whether the seizure took place on February 18th or February 7th does not alter the fundamental defect of which Mitchell complains. No notice was given to him prior to either February 7th or 18th. R. 5; Petitioner's Brief, Appendices "B" and "C." He had no opportunity, neither in reality nor under the applicable statutes, to defend his property prior to seizure, whether that seizure took place on February 7th or 18th. The parties' correction of the erroneous date of seizure has not altered the legal position of either party.

CONCLUSION

For the above reasons and for the reasons stated in his principal brief, Petitioner Lawrence Mitchell respectfully requests that the decisions of the courts below be vacated and reversed and that the sequestration of his household goods be dissolved.

Respectfully submitted,

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MOTION FOR PERMISSION TO FILE BRIEF ON MERITS AFTER ARGUMENT ON BEHALF OF THE STATE OF LOUISIANA

On Writ of Certiorari to the Supreme Court of Louisiana

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